Supreme Court, U.S.
FILED
JAN 15 2002
CLERK

(46)

No. 00-1777

In The

Supreme Court of the United States

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE HANNA PERKINS SCHOOL, ET AL., PETITIONERS

Of Counsel:

DAVID J. HESSLER
NATHAN E. HESSLER
WEGMAN, HESSLER & VANDERBURG
6055 Rockside Woods Boulevard
Suite 200
Independence, Ohio 44131

DAVID J. YOUNG
(*Counsel of Record*)
MICHAEL R. REED
PAUL A. WOLFLA
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700

Counsel for Petitioners Hanna Perkins School, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO RESPONDENTS' STATEMENT OF THE CASE AND ERRONEOUS FACT-BASED ASSERTIONS 1

A. The Selection Of Scholarship Pupils Is Based On A Lottery System..... 3

B. The Amount Of The Scholarship Award Was Not Intended To Result (And Indeed Has Not Resulted) In The Refusal Of Secular Non-Public Schools To Participate In The Program..... 3

C. The Tutorial Grants Are An Integral "Choice" Component Of The Ohio Program 5

D. The Gatton Respondents' Claims Of Proselytizing In The Religiously Sponsored Non-Public Schools Are False And Without Record Support..... 6

E. Religiously Sponsored Non-Public Schools Participating In The Scholarship Program Provide High Quality, State Accredited Education In All Required Secular Subjects Along With An Added Dimension Of Religious Mission..... 10

ARGUMENT 13

I. Respondents' Legal Arguments Are At Variance With Establishment Clause Jurisprudence 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 13, 14, 19, 20

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 14, 15, 16, 18, 19

Mitchell v. Helms, 530 U.S. 793 (2000).....13, 14, 20

Mueller v. Allen, 463 U.S. 388 (1983).....13, 14, 20

Reed v. Rhodes, 869 F. Supp. 1274 (N.D. Ohio 1994) ...2, 3

Sloan v. Lemon, 413 U.S. 825 (1973).....14, 15, 19

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) 13, 14, 15, 17, 20

Wolman v. Walter, 433 U.S. 229 (1977) 1, 6

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 13, 19, 20

STATUTES

Ohio Revised Code § 3313.602 12

Ohio Revised Code § 3313.976(A)(4) 16

Ohio Revised Code § 3313.977(A) 3

Ohio Revised Code § 3313.978(B) 5

Ohio Revised Code § 3313.978(C)(3)..... 6

REPLY TO RESPONDENTS' STATEMENTS OF THE CASE AND ERRONEOUS FACT-BASED ASSERTIONS

One of the more significant shortcomings of Respondents' briefs is their failure to acknowledge the wealth of record evidence that forms the factual backdrop for this litigation. In this regard, there are three critical "real world" aspects of this case that Respondents' briefs attempt to ignore: (1) the unfortunate public school educational crisis that exists in the Cleveland School District (the "District"), (2) the fact that the Ohio General Assembly developed this and other innovative programs to address problems in the District, and (3) that public school children who selected religiously sponsored schools did so because of parental choice rather than governmental coercion. Several *amici curiae* have helped place the historical events that culminated in the enactment of the Ohio Program in proper perspective.[1]

For example, *amici curiae* Professors Jesse Choper, et al., focus on the protracted federal court litigation involving the District that pre-dated the Ohio Program. (*See* Choper Br. pp. 2-4). After cataloging the District's educational failures that eventually caused the United States District Court for the Northern District of Ohio to transfer control of the District to the Ohio State Superintendent of

---

[1] *Amici curiae* the Association of Christian Schools International ("ACSI"), et al., point out that, unlike earlier cases involving aid to education in religious schools that have come before the Court on less than fully developed records, "the record in this case is replete with rich information about the actual effects of the Cleveland program in the lives of parents, teachers and administrators." (ACSI Brief p. 8). The ACSI brief appropriately notes that, because of the more developed record in this case, "the Court may fashion an opinion grounded upon an inspection of known results, not on the shifting sands of lawyers' speculation about 'imaginable but totally implausible evils.' " (*Id.* at 9, quoting *Wolman v. Walter*, 433 U.S. 229, 260 n.6 (1977) (Marshall, J., concurring in part and dissenting in part)).

Education, the Choper brief reminds us that the federal court "urged the state 'to think about innovative programs and undertakings. . . . ' " (Choper Br. p. 4, quoting *Reed v. Rhodes*, 869 F. Supp. 1274, 1277 (N.D. Ohio 1994)). That plea in part led to new legislation providing choice-based scholarships and tutorial grants for public school pupils, the development of new community schools and other forms of direct financial assistance to the District.

The background narrative provided by *amicus curiae* Cleveland City Councilwoman Fannie Lewis further explains the economic and social inequities that plagued the District's public school children in 1995. (Lewis Br. p. 1). With respect to the abysmal performance of the District's schools, the Lewis brief notes:

> Despite per-pupil outlays of roughly $7,000 – twice the state average, and well above the national average – more than two-thirds of the district's students drop or flunk out before their graduation. Those who do graduate, moreover, read, write, and compute at levels well below their counterparts in other cities. Because they lack the finances to pay for any alternative, however, most inner-city Cleveland residents have no choice but to send their children to the City's troubled public schools.

(*Id.*). The Lewis brief also explains the active role that Councilwoman Lewis played in the effort to support the passage of the Program legislation:

> The failure of repeated efforts to reform the system from within led her to become involved with the [Program]. In January 1995, concerned that members of the legislature were not accurately representing the views of inner-city residents – and especially African Americans – on the subject of school choice, she led several busloads of inner-city residents to Columbus to make known their views. This group – including more than 300 people of various races, political persuasions, and faiths – testified at committee hearings and appealed to every member of the legislature. As

> a result of these efforts, the Program soon became law.

(*Id.* at 2).

The historical events that gave rise to and resulted from *Reed v. Rhodes, supra,* provide the proper context in which to view the Ohio General Assembly's crafting of the choice-based scholarships and tutorial grants at issue herein. When Respondents actually reference the factual background of this case, a comparison of their claims with the record shows that their arguments are often based on speculation, presumption, and unwarranted inference. The following are among the more significant examples:

A. The Selection Of Scholarship Pupils Is Based On A Lottery System. As the district court noted in its order, "[Program] [r]ecipients are ***chosen by lot*** and receive a fixed percentage of the tuition charged by the alternative school of their choice, up to $2,500." (State Pet. App. p. 63a) (emphasis added); *see also* Ohio Rev. Code § 3313.977(A) (Hanna Perkins Pet. App. pp. 70a-71a). The Simmons-Harris Respondents attempt to distort the even-handed nature of the scholarship award process by repeatedly referring to the scholarship recipients as "selected" Cleveland children. (*See* Simmons-Harris Br. at (i), 17-18). By referring to the scholarship pupils as "selected" children and omitting the fact that low income recipients are chosen solely by lottery, the Simmons-Harris Respondents apparently would have the Court believe that the recipients have received some form of added preferences. The record reveals that the scholarship and tutorial grants are distributed on a neutral basis to a broad range of public school children and that the recipients and beneficiaries are defined without reference to religion.

B. The Amount Of The Scholarship Award Was Not Intended To Result (And Indeed Has Not Resulted) In The Refusal Of Secular Non-Public Schools To Participate In The Program. The Sixth Circuit (and now the Respondents) erroneously presumed that the amount of the scholarships awarded under the Program limits the

ability of nonreligious schools to participate.[2] That presumption lacks any support in the record and is indeed refuted by record evidence. Indeed, at the time the Program was adopted, there were ten secular non-public schools located within the District. (*See* Ohio Educational Directory, 1999-2000 School Year, Alphabetic List of Non-public Schools, Ohio Department of Education). All ten opted to participate in the Program and continued to participate during the 1999-2000 school year. (*Compare id. with* 1999 Voucher Program, Information Regarding Participating Schools, Religious Affiliation and Student Enrollment, JA 281a-286a). Several new secular non-public schools were created in response to the Program. (*See* Affidavit of David P. Zanotti at ¶4, JA 224a; *see also* Affidavit of David L. Brennan, JA 144a-148a). Two of these new schools were later converted to community school status. (*See* Affidavit of David P. Zanotti at ¶6, JA 225a). Five religiously-sponsored schools located within the District opted-out for financial reasons. (*Compare* Ohio Educational Directory, 2001-2002 School Year, Alphabetic List of

---

[2] The Simmons-Harris Respondents represent that the Government Accounting Office ("GAO") has independently reached the same conclusion as the Sixth Circuit on this score. (*See* Simmons-Harris Br. p. 3, quoting GAO Rep. No. 01-914, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee, at 25 (Aug. 31, 2001)). Upon closer inspection of the GAO report, however, it seems that the language from the GAO report quoted in Respondents' brief is derived solely from the Sixth Circuit's opinion and order under review in this case. Indeed, the sentence that immediately follows the quoted language paraphrases the Sixth Circuit panel majority's erroneous view that the amount of the scholarship restricts the participation of non-religious non-public schools in the Program. When read in its proper context, the passage that the Simmons-Harris Respondents have excerpted from the GAO report can hardly be described as a "conclusion" reached by the GAO. Rather, it is more properly viewed as a conclusion reached by the Sixth Circuit and merely reported by the GAO.

Nonpublic Schools, Ohio Department of Education, *with* 1999 Voucher Program, Information Regarding Participating Schools, Religious Affiliation and Student Enrollment, JA 281a-286a).[3] Thus, there was no *sub rosa* legislative intent to endorse religion by reducing the amount of scholarship grants. The amount of the grants did not control the identity of registering schools. Rather, participation was based primarily upon historical reality. The Program did not reflect a preference for religion. On the contrary, the only new schools created as a result of the Program were secular schools.

C. The Tutorial Grants Are An Integral "Choice" Component Of The Ohio Program. Ohio Revised Code § 3313.978(B) provides for special tutorial assistance grants for public school children in a number equal to the alternate choice scholarships awarded by lottery. (*See* Hanna Perkins Pet. App. p. 74a). As explained in Petitioners' opening brief, these tutorial grants comprise 50% of the choice options available under the Program. (*See* Hanna Perkins Br. pp. 26-27). Without citing any supporting evidence (because there is none), the Gatton Respondents claim that the tutorial grants have "the appearance and substance of nothing more than window-dressing." (Gatton Br. 39). The Gatton Respondents emphasize the different dollar amounts of aid. However, the purpose of the tutorial grants is to allow the families who choose to keep their children in the District's public schools an opportunity to purchase educational enhancements. The statutory formula for computing the amount of the tutorial grants (20% of the amount of the scholarship grants) reflects a legislative judgment that students in need of tutorial assistance could be expected to spend a limited

---

[3] *See also* Affidavit of Sr. Laura Bregar at ¶2 (on file with the Supreme Court of Ohio in *Simmons-Harris v. Goff*, Supreme Court of Ohio, Case No. 97-1117) (noting that Ascension School, which had participated in the Program during the 1996-1997 school year, opted not to register for participation in the Program during the 1997-1998 school year.).

percentage of an average school day on after-school tutorial assistance. (*See* Ohio Rev. Code § 3313.978(C)(3); Hanna Perkins Pet. App. p. 75a).

Because it lacks any support in the record, Respondents' denigration of the tutorial grant component of the Program is better viewed as "window dressing." Do Respondents criticize the tutorial grants because of a preconceived notion that tutoring can have no remedial impact? Do Respondents insist that none of the disadvantaged public school pupils have a need for tutoring? Do Respondents claim that the many public school children who have applied for and are receiving such assistance are realizing no remedial benefit? Needless to say, no record evidence would support any such argumentation. Thus, it appears that Respondents support their harsh criticism of tuition grants with nothing more than "lawyers' speculation about 'imaginable but totally implausible evils.' " *See Wolman v. Walter*, 433 U.S. 229, 260 n. 6 (1977) (Marshall, J., concurring in part and dissenting in part).

D. The Gatton Respondents' Claims Of Proselytizing In The Religiously Sponsored Non-Public Schools Are False And Without Record Support. Petitioners presented substantial affidavit evidence reflecting the cultural and religious diversity of low-income public school children selected by lottery to participate in Ohio's alternative school choice program. This cultural and religious diversity, together with the large percentage of scholarship pupils unidentified with the religious faith of the school sponsor, further supports the conclusion that the Program affects a broad range of pupils on a neutral basis.

The Gatton Respondents attempt to use this religious diversity to support a specious argument that Ohio decided to prohibit participating schools from religious discrimination in their admissions practices in order to enable religiously sponsored schools to proselytize pupils not of the schools' identified faith. They further contend that the purpose and effect of the legislation is proselytization. These assertions not only border on the absurd, but fly in the face of uncontradicted affidavit evidence.

If the Ohio General Assembly intended to enact and implement legislation that would enable religiously sponsored non-public schools to proselytize, it failed miserably. There is not a shred of evidence that a single scholarship child who has enrolled in a religiously-sponsored school altered his faith or religious beliefs as a result of that experience. There is not a shred of evidence that any specific religiously-sponsored school registered to participate in the program has attempted to proselytize scholarship pupils. The following limited excerpts from those affidavits effectively controvert Respondent's antiquated, stereotype views about proselytization:

- Marilyn Culler, a member of the Lutheran church who teaches at St. Mel's Alternative School, stated: "I have not been asked to teach about the Catholic faith in my courses, but I am able to guide students towards the awareness of such virtues as self-discipline, work and perseverance which can be used in their daily lives. Virtues I try to inculcate can be used by Jewish, Muslim or Christian students alike." (Affidavit of Marilyn Culler at ¶¶1, 4; Hanna Perkins Pet. App. pp. 105a-106a).
- Adra Cleveland, the mother of two scholarship pupils who have enrolled in Metro Catholic School, affirmed: "I have not chosen a religious faith at the present time. I was brought up in the Jehovah Witness faith. I don't feel that this school pressures my children to accept the Catholic faith. The diversity in this school gives my children an opportunity to exercise choice. They can see and learn about religions and realize they have a free choice for schools and religion." (Affidavit of Adra Cleveland at ¶¶1, 4; Hanna Perkins Pet. App. at pp. 97a-98a).
- Terri L. Barlow, a member of the United Methodist Church who teaches at St. John Nepomucene testified: "Even though I am a teacher at a Catholic school, I continue to believe and practice my religious faith as I

have all my life. I do not make the sign of the cross or kneel and have not been told that I should do so. I always provide explanations to my students about my church and the ways we believe. They seem to understand. I also show respect for their beliefs." (Affidavit of Terri L. Barlow at ¶¶1, 3; Hanna Perkins Pet. App. pp. 82a-83a).

- Wendy Berning, who enrolled her son in St. Vincent DePaul Catholic School despite the fact that she is not a member of the Catholic faith, stated: "Neither I nor my children have felt any discomfort because we are not of the Catholic faith. We do not experience any pressure to accept the teachings of that church. I understood that this was a Catholic School when I selected it for my children. I selected the School knowing that religion was part of the program. The School has not overstepped in my opinion. The School reinforces the same gospel message that I teach at home. It reinforces values that should apply to everyone in society." (Affidavit of Wendy Berning at ¶3; Hanna Perkins Pet. App. pp. 86a-87a).
- Sharon Cook, who enrolled her son as a scholarship pupil at St. John Cantius School even though she is not a member of the Catholic faith, affirmed: "I have never been told that my son or I have to attend any Church devotional services. He is not made to feel bad if he elects not to participate. He is very comfortable in this school and I believe that he is getting the best education that will help him become a good person." (Affidavit of Sharon Cook at ¶1; Hanna Perkins Pet. App. pp. 101a-102a).
- Nicola L. Davies, a member of the United Methodist Church who teaches at St. Vitus Catholic Alternative School, stated: "St. Vitus provides a diverse cultural and religious student body. There is no pressure on any of the children to accept or to adhere to doctrines of

> the Catholic faith. I am not certified to teach religion and I have not been requested to teach religion in my secular courses." (Affidavit of Nicola L. Davies at ¶1; Hanna Perkins Pet. App. pp. 116a-117a).

- Robert Finkovich, who teaches at Metro Catholic Alternative School, addressed the subject of religious affiliation in his affidavit: "I am not a member of the Catholic faith. I do not consider myself as belonging to any religious organization and do not have strong religious beliefs. This has not placed me in an uncomfortable situation even though I am teaching in a Catholic school. Approximately half of the teachers in our school are not of the Catholic faith. I have never been asked to teach religion in any of my courses and would not be in a position to do so." (Affidavit of Robert Finkovich at ¶¶2-3; Hanna Perkins Pet. App. pp. 129a-130a).

These excerpts, together with passages from the other affidavits referred to at pages 36-44 of Petitioners' brief, reflect an adherence to the principles of religious freedom and personal conscience. Those principles are discussed in the affidavit of Louis Dalton, the Director of the Ohio Catholic School Accrediting Association:

> All Catholic sponsored schools must recognize that the parent has the ultimate authority over the education of the child. All of the Catholic Diocesan schools recognize that, to varying degrees, students in those schools are not members of the Catholic Church, nor are they all Christians. Religious freedom and the personal conscience of individual students and their families must be respected and this freedom is explicitly recognized by the Catholic Church. . . .

(R. 113, S.J. Memo Exh. 48 at ¶3). As every informed person in Ohio must be fully aware of the fact that the Program was adopted as one of several responses to the alarming educational crisis in the District, it is quite troubling to find Respondents and supporting *amici* argue that

"advancement of religion was an intended consequence of the voucher program." (*See, e.g.*, Brief of *Amici Curiae* Ohio School Boards Association, et al., p. 21).

E. Religiously Sponsored Non-Public Schools Participating In The Scholarship Program Provide High Quality, State Accredited Education In All Required Secular Subjects Along With An Added Dimension Of Religious Mission. Respondents dwell upon the religious missions of certain alternative schools, but fail to acknowledge the outstanding achievements in state required courses by these schools. (*See* Hanna Perkins Br. pp. 10-11). Perhaps the most notable of those achievements is the high marks scored by students in the participating schools on the citizenship component of the Ohio Proficiency Test. (*Id.*). Petitioners readily admit that participating religiously sponsored schools have a religious mission and that such varies from school to school. Petitioners address religious mission not to suggest that it should be constitutionally determinative, but to refute the unfair caricaturizing presented by Respondents. Respondents describe these educational institutions as if they were little more than Sunday religious schools. Again, the affidavit of Louis Dalton has fairly stated the case without exaggeration or distortion:

> In order to assess the educational program being conducted at the Cleveland Diocesan Schools that have registered to participate in this Program, one would have to look at much more than the Mission Statements that have been presented to the Court. Based on my experience, I do not believe that a significant number of the schools attempt to carry formal religious classes into other State-mandated secular courses. Attempting to teach religion in a secular education course is quite different from attempting to provide fundamental value formation throughout the entire curriculum. . . .

(R. 113, S.J. Memo Exh. 48, at ¶5).

Respondents delight in repeated quotation of excerpts from religious mission statements to support their unfair

caricaturizing. However, both the stipulation which led to the admission of the mission statements and the affidavit evidence reveal that those statements are not designed to address and do not address the scholarship program or integration of the scholarship pupils. Louis Dalton, in paragraph 2 of his affidavit, explains:

> I have had occasion to review a large number of the documents that have been presented in this case as the Mission Statements of Catholic sponsored schools in the Diocese of Cleveland and can state unequivocally that they do not totally reflect the mission of the school or the standards that must be met for [state] accreditation. None of these Statements addresses the planning and implementation relating to integration of the Scholarship pupils into these educational programs: neither do they fully address how the State-mandated secular courses are taught and how these schools attempt to provide formation and fundamental Christian values essential to proper functioning in family, community, society and the world.

Notwithstanding the questionable relevance of the mission statements, the Gatton Respondents point, for example, to the following sentence taken from one of the mission statements as outcome determinative: "[t]he mission of St. Patrick School is to live and teach the Gospel message." (*Id.* at 10).[4] But, boiled down to its essence, this gospel message (and the collective mission of these

---

[4] It bears noting that the same document from which that mission statement was excerpted emphasizes institutional goals that can hardly be characterized as purely religious in nature: "Among the values prized in the Catholic School are self-worth, self-discipline in the search for a moral way of life, and appreciation of our American Heritage." (JA 407a, "St. Patrick School Family Handbook").

schools) is to live and teach love and respect for neighbor and community.[5]

A parallel, but not religiously motivated, mission is imposed upon Ohio's ***public*** schools by law:

> (B) In the development of its graded course of study, the board of education of each city and exempted village school district and the governing board of each educational service center shall ensure that the principles of democracy and ethics are emphasized and discussed wherever appropriate in all parts of the curriculum for grades kindergarten through twelve.
>
> (C) Each city, local, exempted village, and joint vocational school board shall adopt policies that encourage all certificated and noncertificated employees to be cognizant of their roles in instilling ethical principles and democratic ideals in all district pupils.

Ohio Rev. Code § 3313.602.

The flaws in Respondents' arguments are not confined to their reliance upon speculation rather than record facts. Respondents either ignore or fail to recognize the teachings of this Court's controlling Establishment Clause precedents. The law applicable to this case is well-traveled ground. As explained below, this case involves the analysis of a neutral educational aid program that is sanctioned by this Court's precedents because it benefits a broad class of citizens defined without reference to religion and allows the beneficiaries to choose an educational program that is best suited to students' educational needs.

---

[5] Exhibit 1 to the Dalton Affidavit describes these values as dignity of the individual, right to life, sacredness of the family, need for laws and regulations, justice and peace, respect for American heritage, respect for people of different cultures, dependence of all human beings, global interdependence, inquiring mind to social, political and economic issues, the dignity of work and conservation of natural resources.

ARGUMENT

I. Respondents' Legal Arguments Are At Variance With Establishment Clause Jurisprudence.

In their opening brief, Petitioners established that the Ohio Program satisfies the Establishment Clause tests enumerated in *Agostini v. Felton*, 521 U.S. 203 (1997), and *Mitchell v. Helms*, 530 U.S. 793 (2000).[6] First, the Ohio Program does not "result in governmental indoctrination." *Agostini*, 521 U.S. at 234. Scholarship tuition grants are negotiated to alternative schools that provide religious instruction in addition to state accredited secular education only as a result of a free choice made by the child's parent. Second, the Ohio Program does not "define its recipients by reference to religion." (*Id.*) All schoolchildren who meet the economic criteria receive equal scholarship or tutorial benefits, without regard to the religious or nonreligious, public or private nature of their school. Lastly, the Ohio Program does not "create an excessive entanglement." *Agostini*, 521 U.S. at 234. The nature of the aid is such that no intrusive surveillance or interference with the autonomy of the participating schools is necessary to ensure that constitutional requirements are satisfied.

In response to Petitioners' *Agostini/Mitchell*-based tests, Respondents attempt to distinguish an entire line of precedent and posit new tests of their own. The principal test that the Simmons-Harris Respondents urge the Court to apply is an overly simplistic one: "whether the *moneys* the [Program] provides to participating sectarian private schools are 'properly attributable to the State.' " (*See* Simmons-Harris Br. p. 6; *see also id.* at 5, 12, 16, 29 and 34)

---

[6] These tests, of course, are outgrowths of the principles upon which the decisions in *Mueller v. Allen*, 463 U.S. 3838 (1983), *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), rest.

(emphasis added).[7] This surely cannot be the proper test of constitutionality for this (or any other Establishment Clause) case. Indeed, the financial aid made available to the scholarship families is, of course, drawn from state issued checks. As noted above, the real test constructed by this Court's precedents is whether the aid results in governmental indoctrination; defines recipients by religion; and creates excessive entanglement. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (O'Connor, J., concurring); *Agostini*, 521 U.S. at 234. If the enrollment in a religiously sponsored school is the result of free parental choice, it is inconsequential that the check was drawn by or attributable to the

---

[7] The Simmons-Harris Respondents proclaim that their test is based on "the well-considered teachings of the *Nyquist*, *Sloan* and *Witters* trilogy of decisions." (Simmons-Harris Br. p. 24). In fact, these Respondents claim that the "decisions in *Nyquist*, *Sloan* and *Witters* . . . form a coherent doctrinal whole." (*Id.*). To be sure, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) and *Sloan v. Lemon*, 413 U.S. 825 (1973) are properly viewed as companion cases that share the same rationale and result. However, the Simmons-Harris Respondents' attempt to link those cases together with *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986) to form a **trilogy** misstates the essential holding of *Witters*. Except for the key principle of neutrality contained in footnote 38 of the *Nyquist* opinion, the *Nyquist* and *Sloan* decisions have no bearing on this case because those cases fail to provide any analysis of the role that private choice plays in the application of the Establishment Clause analysis of aid to education in religious schools. In contrast, *Witters* reaffirmed the importance of individual choice recognized in *Mueller v. Allen*, 463 U.S. 388 (1983). Calling *Nyquist*, *Sloan* and *Witters* a trilogy disregards the drastically different analytical direction taken by *Witters* and followed in subsequent cases.

Notably, the Gatton Respondents express a contradictory view of *Witters*. Indeed, instead of placing reliance on *Witters* or basing their essential test on that case, the Gatton Respondents argue that *Witters* "is so thoroughly distinguishable as to lack any persuasive force for present purposes." (Gatton Br. p. 25).

state. Enrollment is attributable to parental choice, not the state.

Still working within the parameters of the "moneys properly attributable to the State" test,[8] the Simmons-Harris Respondents next attempt to establish a "continuum" of constitutional analysis regarding aid to education in religious schools. On one end of their continuum, the Simmons-Harris Respondents have placed what they call "direct-government-per-capita-payment" programs. (Simmons-Harris Br. p. 18). Permissible parental transfers to religious schools " 'similar to [a] hypothetical salary donation' " by a "government employee from a government paycheck to a religious institution" are on the other end of this spectrum. (*Id.* at p. 12). According to the Simmons-Harris Respondents, the salary-donation-transfer program is permissible, but the direct-government-per-capita-payment program is unconstitutional. (*Id.* at 18). The apparent rationale behind this conclusion is that in the latter program, there is no choice. Instead of channeling the state aid through a third party who then exercises independent choice, the direct-government-per-capita-payment program allows the state funds to flow directly to the religious schools based solely upon the number of eligible students attending those schools.

In plotting this "continuum," Respondents have (perhaps unwittingly) highlighted one of the more significant distinctions between the Ohio Program and the New York program struck down in *Nyquist*. Although the New York

---

[8] The Simmons-Harris Respondents candidly acknowledge that their proffered test is far from definitive: "We recognize that the *Nyquist, Sloan* and *Witters* decisions do not state the governing law in terms that draw a definite line of demarcation between government tuition grant programs 'skewed towards religion' that fail under the Establishment Clause, and those that provide 'a huge variety' of educational options, 'only a small handful' of which are sectarian educational options that pass Establishment Clause muster." (Simmons-Harris Br. pp. 24-25).

program in *Nyquist* did require the parents of non-public school children to apply for aid, the aid was provided completely after-the-fact. Indeed, the parents who received the state aid had already decided to place their children in the non-public schools. The only citizens who could receive the money were parents who had already decided to send their children to a religiously sponsored school. In *Nyquist*, the religious schools under consideration discriminated in admission on the basis of religion.[9] Thus, unlike this case, there was no independent process whereby troubled public school students and their families were making choices about whether children should remain in the public school system, take tutorial grants, or apply a scholarship grant towards the payment of tuition at a wide range of nondiscriminatory non-public schools. In *Nyquist*, a limited class of citizens defined with respect to religion were given a choice to accept or reject $50.00. Therefore, in *Nyquist*, the state rewarded a class of citizens for already having selected a religiously sponsored school.

The *Nyquist* program was thus closely akin to the direct-government-per-capita-payment program described by the Simmons-Harris Respondents; it was based purely on numbers and the students who benefited from the program remained in the same schools. There, in effect, was only one "choice" afforded by the *Nyquist* program: if you were the parent of a child enrolled in a non-public

---

[9] There was no evidence in *Nyquist* that any of the children who benefited from the New York program were public school pupils. Indeed, according to the profile adopted by the district court in *Nyquist*, the majority of the non-public schools in New York actually included religious restrictions in their admissions policies. *Nyquist*, 413 U.S. at 769. Under the Ohio Program, discrimination based on religion is strictly prohibited. *See* Ohio Rev. Code § 3313.976(A)(4) (Hanna Perkins Pet. App. pp. 67a-68a). In *Nyquist*, a public school child could not enroll in the school and get the grant unless he was of the same religious faith of the religiously sponsored school.

school in New York, you could choose to either accept or reject the $50 per student aid offered by the state.

The Simmons-Harris Respondents also appear to elevate the "skewed towards religion" language found in *Witters* to the level of an additional test of constitutionality. (*See* Simmons-Harris Br. p. 35 ("But the fact that the universe of participating private schools is so heavily skewed towards sectarian private schools providing a religious education means that the Program also violates the Establishment Clause in 'a second respect.' ")). In arguing that the Program fails this "skewed towards religion" test, the Simmons-Harris Respondents emphasize that 82% of the schools to which the scholarship grants ultimately flow are sponsored by a religious faith. (*Id.* at 38). This argument completely ignores the full breadth of the Ohio Program's choice options.[10]

---

[10] *Amici curiae* the State of Florida, et al., effectively explain why neither the percentage of participating religiously sponsored schools nor the percentage of students selecting those schools should be constitutionally relevant. (*See* Florida Br. pp. 14-18). Indeed, the Florida brief demonstrates that the distribution of non-religious to religious non-public schools varies across the United States. (*See id.* at pp. 15-16). In light of the data cited in their brief, these *amici* properly conclude that "the fact that 82 percent of the schools participating in the Ohio program were [religiously sponsored] did not show, as the Sixth Circuit concluded, that the program discouraged participation by [non-religious] schools. To the contrary, the Ohio program appears to have captured a remarkably fair cross-section of the state's private schools, as the U.S. Department of Education survey shows that 80.97 percent of Ohio's private schools are [religiously-sponsored]." (*Id.* at 17).

Although Respondents take aim at the State Petitioners for their comparison of Cleveland's non-public schools with Columbus' non-public schools (*see, e.g.*, Gatton Br. p. 42, n. 10; Simmons-Harris Br. p. 25, n. 8), the Respondents appear to reach divergent conclusions on a statistics-based evaluation of an aid program such as the Ohio Program. (*Compare* Gatton Br. p. 42 (suggesting

As explained in Petitioners' opening brief, the Ohio Program is not "skewed towards religion" because, in addition to the alternate choice scholarship grants for use at non-public schools, the legislation provides for an equal number of tutorial grants to be awarded to children who remain in the District's *public* schools. (*See* Hanna Perkins Br. p. 26). Because not all of the participating non-public schools are religiously sponsored, the fact remains that the Program provides more options for educational aid in secular educational programs (public school tutoring or secular non-public scholarships) than in religiously sponsored schools.

Moreover, as the affidavits submitted by the educators and parents of scholarship pupils establish, more than half of the scholarship pupils enrolled in the participating religiously sponsored schools are not of the same faith as the sponsoring religion. (*See, e.g.*, Affidavit of Carolyn Jurkowitz at ¶15, Hanna Perkins Pet. App. pp. 145a-149a). It bears repeating that, "unlike *Nyquist*, this is not a program designed to help Lutherans attending Lutheran schools, Catholics attending Catholic schools, Baptists attending Baptist schools or Episcopalians attending Episcopalian schools." (Hanna Perkins Br. p. 47). Choices to send children to particular religiously sponsored schools are not being made on the basis of religion, but instead on the basis of the educational needs of the child, the standards maintained by the participating schools and the secular

---

that any program providing "substantial aid" regardless of the percentage of non-religious schools participating therein is unconstitutional) *with* Simmons-Harris Br. p. 26, n. 8 (conceding that a program in which the participation of secular and religiously sponsored schools was split 50%-50% would be constitutional)). The inconsistent positions reached by Respondents themselves further underscores the irrelevance of a statistical analysis of the non-public schools participating in the Ohio Program that only takes into account whether the non-public schools are religiously sponsored.

educational standards imposed on non-public schools by the State of Ohio.

Unlike the Simmons-Harris Respondents, the Gatton Respondents do not attempt to construct a new Establishment Clause test for this case. Instead, these Respondents cling tightly to this Court's decisions in *Nyquist* and *Sloan*, and contend that the refinement of Establishment Clause principles in subsequent cases has not foreclosed the applicability of *Nyquist* and *Sloan*. (Gatton Br. pp. 24-34). Both here and in their opening brief, Petitioners have gone to great lengths to point out the numerous factual and legal distinctions that render *Nyquist* (and/or *Sloan*) inapposite. (Hanna Perkins Br. pp. 45-50; *supra* at pp. 15-17). The Gatton Respondents erroneously conclude, however, that "[i]t follows that a reversal of the two courts below would necessitate overruling *Nyquist*." (Gatton Br. p. 31; *see also* Simmons-Harris Br. p. 11). This contention is unfounded. Because *Nyquist* is so thoroughly distinguishable as not to apply to this case, the Court may reverse the judgment of the Sixth Circuit without overruling *Nyquist*.

At bottom, Respondents misconceive the primary constitutional concern at issue in this case, which is not that private school teachers might engage in religious "indoctrination," but that the government might do so. *See Agostini*, 521 U.S. at 224 ("Because the only government aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause' ", quoting *Zobrest*, 509 U.S. at 13); *id.* at 226 ("the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a 'result of the private decision of individual parents' and [could not] be attributed to state decisionmaking", quoting *Zobrest*, 509 U.S. at 10).

CONCLUSION

Decisive shifts in Establishment Clause jurisprudence came about in *Mueller*, *Witters*, and *Zobrest*. Those shifts were formally recognized in doctrinal terms in *Agostini* and *Mitchell*. Nothing more is required here than application of those principles. Such an application reveals that the Ohio Program does not (1) "result in government indoctrination," (2) "define its recipients by reference to religion," and/or (3) "create an excessive entanglement."

For the foregoing reasons, as well as those reasons stated in their opening brief, the Hanna Perkins School, et al., Petitioners respectfully request that this Honorable Court reverse the judgment of the Sixth Circuit.

Respectfully submitted,

Of Counsel:

DAVID J. HESSLER
NATHAN E. HESSLER
WEGMAN, HESSLER & VANDERBURG
6055 Rockside Woods Boulevard
Suite 200
Independence, Ohio 44131

DAVID J. YOUNG
(*Counsel of Record*)
MICHAEL R. REED
PAUL A. WOLFLA
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700

Counsel for Petitioners Hanna Perkins School, et al.